Score Options Sdn Bhd v Mexaland Development Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02()-58–09 OF 2011
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, HASHIM YUSOFF, ABDULL HAMID EMBONG AND ZAINUN ALI FCJJ
7 AUGUST 2012

Land Law — Restraint on dealings — Caveats — Private caveats — Removal — Whether respondent had caveatable interest in land — Whether joint venture cum project management agreement conferred interest in land on respondent — Whether interest in land was existing interest — Whether parties could create caveatable interest by agreement — National Land Code s 323(1)

The appellant land owner entered into a joint venture cum project management agreement ('JVPM agreement') with the respondent to develop part of its land into a housing estate ('the project land'), with the remaining part of the land to be sold to another company. Upon executing the JVPM agreement, the appellant and respondent had simultaneously executed two powers of attorney in favour of the respondent that gave the latter rights in respect of the development project. In return the respondent was to pay the appellant a guaranteed sum of money. Under the JVPM the parties had agreed that the respondent would launch the development of the project by 1 June 2006. It was also a term of the JVPM that the respondent had the right to enter a private caveat on the project land. The respondent accordingly entered the caveat, but the caveat was registered against the whole land instead of just the project land. Subsequently a dispute arose between the parties and the appellant sought to terminate the JVPM agreement on the grounds that the respondent had breached the agreement by failing to launch the project by 1 June 2006. The respondent commenced a suit against the appellant for wrongful termination of the JVPM. In the meantime the appellant applied to the registrar of titles to remove the caveat entered on the land. When the respondent received notice of this removal, it made an ex parte interlocutory application for the extension of the caveat until the final determination of its suit against the appellant. The High Court dismissed the respondent's application on the grounds that it had no caveatable interest to lodge or extend the caveat. Dissatisfied the respondent appealed to the Court of Appeal, which by a majority allowed the respondent's appeal with costs. The appellant then obtained the leave of this court to proceed with the present appeal against the decision of the Court of Appeal. The appellant submitted that the JVPM agreement was only an agreement for sharing the profits from the development of the project land. As such, it was the appellant's case that the JVPM agreement, including the powers of attorney created thereunder, only gave the

respondent a contractual right to manage and develop the project land and not a right of ownership or any caveatable interest in the land. On the other hand, the respondent claimed that it had a registerable interest in the land by virtue of the JVPM agreement. The respondent argued that by virtue of the powers of attorney executed under the JVPM agreement, the appellant had relinquished its ownership of the land to it. The respondent further submitted that cl 6 in the JVPM agreement had given it the right to lodge the caveat.

Held, allowing the appeal with costs:

(1) Based on the provisions of the NLC and the authorities cited by the parties, this court was of the considered view that the only parties who were authorised to lodge a private caveat were those who could effect dealings in the particular interests in the land. The caveator had to have a 'registerable interest' under s 323(1)(a) of the NLC. In order to be a caveatable interest, the interest should represent a transaction that could ultimately lead to its registration on the register. In the instant appeal, the appellant had conferred numerous rights on the respondent under the JVPM agreement and the powers of attorney, but all these rights were merely rights to develop the land that would give rise to a monetary interest or a right in personam against the appellant and did not create any interest in the land (see paras 35–38).

(2) Further the registerable interest that the caveator was claiming should be an existing interest and cannot include potential interest or interest in futuro. This was a principle firmly embedded in our Torrens system. In the present case, even though the respondent was given the option to purchase the units it developed and to transfer the units to itself if it so chose, that right had yet to be exercised at the time when the caveat was lodged. Therefore, the right had not ripened into an interest in the land (see paras 39, 40, 42 & 44).

(3) Since a caveat was purely a creature of statute that could only be lodged and maintained according to the statute by a person who was authorised to do so by statute, the parties could not by agreement between themselves create a caveatable interest. In the present appeal, this court found that the respondent had failed to discharge the burden that he had a caveatable interest in the land under s 323 of the NLC. Accordingly, the caveat was liable to be removed at the instant of the appellant/caveatee (see paras 45–47).

[Bahasa Malaysia summary

Perayu pemilik tanah memasuki satu usahasama merangkap perjanjian pengurusan projek ('perjanjian JVPM') dengan responden untuk memajukan sebahagian tanahnya kepada kawasan perumahan ('tanah projek'), dengan baki tanah tersebut dijual kepada satu lagi syarikat. Selepas menandatangani

perjanjian JVPM tersebut, perayu dan responden telah pada masa yang sama menandatangani dua surat kuasa wakil memihak kepada responden yang memberikan responden hak berkaitan dengan projek pembangunan tersebut. Sebagai balasan responden sepatutnya membayar kepada perayu sejumlah wang yang dijamin. Di bawah JVPM tersebut, pihak-pihak bersetuju bahawa responden akan melancarkan pembangunan projek tersebut sebelum 1 Jun 2006. Ia juga terma JVPM bahawa responden mempunyai hak untuk memasukkan kaveat persendirian ke atas tanah projek tersebut. Responden oleh itu memasukkan kaveat, tetapi kaveat tersebut didaftarkan terhadap keseluruhan tanah dan bukan hanya tanah projek. Kemudian suatu pertikaian berbangkit di antara pihak-pihak dan perayu memohon untuk membatalkan perjanjian JVPM atas alasan bahawa responden telah memungkiri perjanjian kerana gagal melancarkan projek tersebut sebelum 1 Jun 2006. Responden memulakan guaman terhadap perayu bagi penamatan salah JVPM. Sementara itu perayu memohon kepada pendaftar hak milik untuk membatalkan kaveat yang dimasuki ke atas tanah tersebut. Apabila responden menerima notis pembatalan ini, ia membuat permohonan interlokutori ex parte bagi lanjutan kaveat sehingga pemutusan akhir guamannya terhadap perayu. Mahkamah Tinggi menolak permohonan responden atas alasan bahawa ia tidak mempunyai kepentingan yang boleh dikaveat untuk memasukkan atau melanjutkan kaveat tersebut. Tidak berpuas hati, responden merayu kepada Mahkamah Rayuan, yang mana secara majoriti membenarkan rayuan responden dengan kos. Perayu kemudian memperoleh kebenaran mahkamah ini untuk meneruskan dengan rayuan semasa terhadap keputusan Mahkamah Rayuan. Perayu menghujah bahawa perjanjian JVPM hanyalah perjanjian perkongsian keuntungan daripada pembangunan tanah projek tersebut. Oleh demikian, ia adalah kes perayu bahawa perjanjian JVPM tersebut, termasuk surat kuasa wakil yang dibentuk di bawahnya, hanya memberikan kepada responden hak kontrak untuk menguruskan dan membangunkan tanah projek tersebut dan bukan hak milikan atau apa-apa kepentingan yang boleh dikaveat terhadap tanah tersebut. Sebaliknya, responden menyatakan bahawa ia mempunyai kepentingan boleh didaftar terhadap tanah berikutan perjanjian JVPM. Responden menghujah bahawa berikutan surat kuasa wakil yang ditandatangani di bawah perjanjian JVPM, perayu telah menyerahkan pemilikannya ke atas tanah tersebut kepadanya. Responden selanjutnya menghujah bahawa klausa 6 di dalam perjanjian JVPM telah memberikannya hak untuk memasukkan kaveat.

Diputuskan, membenarkan rayuan dengan kos:

(1) Berdasarkan peruntukan KTN dan autoriti-autoriti yang dinyatakan oleh pihak-pihak, mahkamah ini adalah berpendapat bahawa hanya pihak-pihak yang diberi kuasa untuk memasukkan kaveat persendirian yang boleh membuat urusan berkaitan dengan kepentingan di dalam tanah tersebut. Pengkaveat perlu mempunyai 'registrable interest' di

bawah s 323(1)(a) KTN. Untuk membentuk kepentingan yang boleh dikaveat, kepentingan tersebut perlu mewakili transaksi yang pada akhirnya menjurus kepada pendaftaran di dalam daftar. Di dalam rayuan ini, perayu memberikan beberapa hak kepada responden di bawah perjanjian JVPM dan surat kuasa wakil, tetapi kesemua hak ini hanya hak untuk membangunkan tanah yang akan membawa kepada kepentingan kewangan atau hak *in personam* terhadap perayu dan tidak membentuk apa-apa kepentingan dalam tanah (lihat perenggan 35–38).

(2) Selanjutnya kepentingan yang boleh didaftar yang pengkaveat menuntut sepatutnya menjadi kepentingan yang sedia ada dan tidak boleh termasuk kepentingan berpotensi, atau kepentingan *in futuro*. Ini adalah prinsip yang termaktub secara tetap di dalam sistem Torrens. Di dalam kes ini, walaupun responden telah memberikan pilihan untuk membeli unit-unit yang dimajukannya dan untuk memindahkan unit-unit kepadanya sendiri jika ia mahu, hak tersebut belum dilaksanakan pada masa kaveat tersebut dimasukkan. Oleh demikian, hak tersebut tidak matang menjadi kepentingan dalam tanah (lihat perenggan 39, 40, 42 & 44).

(3) Oleh sebab kaveat tersebut adalah semata-mata dibentuk oleh statut yang hanya boleh dimasukkan dan dikekalkan menurut statut oleh orang yang berkuasa untuk berbuat demikian di bawah statut, pihak-pihak tidak boleh melalui perjanjian di antara mereka membentuk kepentingan yang boleh dikaveat. Di dalam rayuan ini, mahkamah ini mendapati bahawa responden telah gagal melepaskan beban bahawa dia mempunyai kepentingan yang boleh dikaveat di bawah s 323 KTN. Dengan itu, kaveat tersebut perlu dikeluarkan atas permohonan perayu/pengkaveat (lihat perenggan 45–47).]

Notes

For cases on caveats, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3990–4398.

Cases referred to

Butler v Fairclough & Anor (1917) 23 CLR 78 (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212, PC (refd)
Goo Hee Sing v Will Raja & Anor [1993] 3 MLJ 610, HC (refd)
Haroon bin Guriaman v Nik Mah binte Nik Mat & anor [1951] MLJ 209 (refd)
Jit Kaur v Parl Singh [1974] 2 MLJ 199; [1974] 1 LNS 57 (refd)
Kamra Jaya Sdn Bhd v Mulia Cemerlang Sdn Bhd [2007] MLJU 64; [2007] 3 CLJ 93, HC (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (folld)
Medan Damai Sdn Bhd v Chang Nam Lai [1994] MLJU 305; [1995] 1 CLJ 160, HC (refd)

Miller v Minister of Mines and Attorney General of New Zealand [1963] AC 484, PC (refd)
Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145; [1969] 1 LNS 116 (refd)
New Zealand case of Philpott v NZI Bank Ltd (1990) ANZ Conv Rep 242 (refd)
Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor [2003] 3 MLJ 522, CA (refd)
Pile's Caveats, Re [1981] Qd R 81 (folld)
RAP Nathan v Hj Abdul Rahman bin Hj Yusoff & Ors [1980] 1 MLJ 248 (refd)
Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44, PC (refd)
Tan Geok Teck dan yang lain-lain v Upaya Kelana (M) Sdn Bhd [2007] 3 MLJ 497; [2007] 3 CLJ 312, CA (refd)
Tan Heng Poh v Tan Boon Thong & Ors [1992] 2 MLJ 1, SC (refd)
Trans-Summit Sdn Bhd v Chun Nyook Lin [1995] 2 MLJ 247, CA (refd)
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113, FC (refd)
Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614, SC (refd)
Zemine Development Sdn Bhd v Hong Kong Realty Sdn Bhd [2011] 4 MLJ 466; [2009] 5 CLJ 218, CA (distd)

Legislation referred to

National Land Code ss 323, 323(1), (1)(a), (b), (c), 326(2), Forms 19B, 19C

Yoong Sin Min (TM Eng and Celestina Chin with her) (Jal & Lim) for the appellant.
Bruce Lim Cheang Nyok (Rusdy bin Ishak with him) (Lim & Yeoh) for the respondent.

Arifin Zakaria Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the Court of Appeal dated 19 May 2010 allowing the respondent's appeal. This court had on 22 August 2010 granted the appellant leave to appeal to this court on the following questions of law:

(a) with reference to s 326(2) of the National Land Code, what are the requirements to be satisfied by a caveator before the court may allow an extension of a private caveat on an ex parte basis?;

(b) whether a party to a joint venture agreement to develop land for profit has a caveatable interest in the land?;

(c) whether a private caveat lodged over the whole of a land can be permitted to remain if the caveator's alleged interest is only limited to part of the land?; and

(d) whether a person must demonstrate that he comes within s 323(1) of the National Land Code to entitle him to lodge/maintain a private caveat on land, notwithstanding the existence of an agreement which allows him to so enter such private caveat?.

THE FACTS

[2] The facts giving rise to this appeal may be summarised as follows: The appellant is the registered proprietor of a piece of land held under HS (D) 112510, PT No 2063 in the Mukim and District of Petaling, Selangor Darul Ehsan ('the land'). The appellant is a subsidiary company of Austral Development Sdn Bhd, formerly known as, Mexaland Sdn Bhd ('Austral').

[3] The appellant had entered into a joint venture cum project management agreement dated 22 February 2006 ('the JVPM agreement') with Austral and the respondent to develop part of the land measuring approximately 45.14 acres into a housing estate ('the project land'). The remaining part of the land had been sold to and was developed by another company: Glomac Alliance Sdn Bhd.

[4] Under the JVPM agreement, Austral was appointed as the developer ('the developer'), while the respondent was appointed as the project manager. Upon executing the JVPM agreement, the appellant and the respondent by virtue of cl 9 of the JVPM agreement had simultaneously executed two powers of attorney in favour of the respondent, giving the respondent rights in respect of the development project.

[5] In return, the respondent would pay the appellant and the developer a guaranteed sum of not less than RM38m or a sum equivalent to the percentages of gross development value ('GDV') of each type of building developed as detailed in cl 4 of the JVPM agreement. For the purpose of the JVPM agreement, the GDV was fixed at RM234,184,000.

[6] To part finance the project, the appellant and the developer had secured loans for RM95m from Malayan Banking Bhd and had encumbered 4 charges over the land and debentures creating charges over the appellant's assets, all in favour of Malayan Banking Bhd.

[7] Under the JVPM agreement, the respondent is to launch the development of the project by 1 June 2006 ('the launching date').

[8] Under cl 2A and cl 7B.1(e) of the JVPM agreement, the respondent is granted physical possession of certain portions of the land to be developed and the exclusive right to manage the development, including the right to do preparatory works, to apply for building plan approval and the right to sell the completed units.

[9] Under cl 6.1 of the JVPM agreement, the respondent is given the right to enter a private caveat on the land but confined only to the project land. The respondent had accordingly entered a private caveat against the land, which was registered on 10 January 2007 ('the caveat'). The caveat was registered against the whole land instead of just the project land.

[10] In the application for entry of a private caveat in Form 19B of the National Land Code ('the NLC') and the accompanying statutory declaration, the respondent stated that it had the right to lodge the caveat by virtue of cl 6.1 of the JVPM agreement.

[11] In the meantime, a dispute arose between the parties over the project following which the appellant, vide its letter dated 8 February 2007, sought to terminate the JVPM agreement, on the alleged breach of the agreement by the respondent that is, in failing to launch the project by 1 June 2006 as stipulated in cl 12.1.1(a) of the JVPM agreement.

[12] Am-EI Construction Sdn Bhd ('Am-EI') was then appointed to take over and continue with the project.

PROCEEDINGS IN THE HIGH COURT

[13] Dissatisfied with the termination, on 16 May 2007, action was commenced against the appellant, the developer and Am-EI in the High Court ('the suit') seeking, inter alia, for an order of specific performance and a declaration that the termination was wrongful.

[14] On the same day, the respondent filed an inter partes application for an injunction to restrain the appellant and Austral from, inter alia, entering into any agreement, contract, tender or letter of award with any other party; and to restrain the appellant and Austral from entering and carrying out any work or to appoint any party other than the respondent to carry out any work or to occupy the project land until the disposal or final determination of the suit ('the respondent's injunction application').

[15] On 29 October 2007, the respondent's injunction application was

dismissed by the High Court. The respondent appealed to the Court of Appeal against the said dismissal. The appeal was subsequently withdrawn on 24 August 2010.

[16] On 11 June 2007, the appellant, Austral and Am-EI filed their respective defence to the suit. The suit is currently pending before the High Court.

[17] In the meantime, the appellant applied to the Registrar of Titles, of Selangor to remove the caveat. On 21 May 2007, the respondent received a notice of the intended removal of the caveat in Form 19C of the NLC issued by the Registrar of Titles.

[18] After receiving such notice, on 2 July 2007 the respondent made an ex-parte interlocutory application to the High Court under s 326(2) of the NLC to extend the caveat until the final determination of the suit.

[19] On 11 July 2007, the High Court dismissed the respondent's ex-parte application for extension of the caveat. In dismissing the application the High Court held, inter alia, that the respondent has no caveatable interest to lodge or extend the caveat. The JVPM agreement and, in particular, cl 6 does not vest in them with any caveatable interest so as to entitle them to lodge the caveat. Under the NLC, whether or not the respondent has any caveatable interest, must be determined with reference to s 323(1)(a), (b) or (c) of the NLC. By merely placing reliance on the JVPM agreement and in particular cl 6.1 alone does not bring the respondent into any of the classes of persons specified in the said s 323(1) of the NLC.

PROCEEDINGS IN THE COURT OF APPEAL

[20] Dissatisfied, the respondent appealed to the Court of Appeal. On 19 May 2010, the Court of Appeal by a majority decision allowed the respondent's appeal with costs.

[21] In the majority judgment of the Court of Appeal, it was held that:

> It is clear that what the appellant had acquired under the JVPM agreement were rights which though not in its present form capable of causing a substantive entry on the register, nevertheless entitled the appellant to claim a 'right to such title or interest' in a portion of the respondent's land which gives it the right to 'otherwise deal with all of the Units at any time'. There is no provision under the agreement that says the appellant cannot hold any of the units for itself or any compulsion that it must sell all the units to purchasers. In short, the appellant could at its option acquire a direct proprietary interest or title in any or all of the units by paying the prevailing market value for each unit. We are therefore bound to agree with the

submission of counsel for the appellant that the right it acquired was not merely a right to the profits of the development but a legitimate registrable interest in the land which it can lawfully caveat.

[22] In the dissenting judgment, the learned judge held as follows:

It is part and parcel of my judgment that the appellant does not possess any caveatable interest which entitles it to enter the private caveat on the project land for the following reasons:

(a) that the JVPM agreement does not confer any caveatable interest in favour of the appellant;

(b) that the appellant's interest is purely monetary in nature; and

(c) that the existence of cl 6.1 of the JVPM agreement allowing the appellant to register a private caveat on the project land does not in itself confer a caveatable interest in favour of the appellant.

It is wishful thinking on the part of the appellant that the JVPM agreement standing in isolation would confer caveatable interest. Way back in 2003, this court in *Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor* [2003] 3 MLJ 522 at p 523; [2003] 3 CLJ 522 at p 525, speaking through Gopal Sri Ram JCA (later FCJ) said:

> It is established by authority that a joint venture agreement to develop land and to share proceeds of the development does not confer a caveatable interest even if the agreement itself expressly provides for entry of a caveat (see *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113 per Hashim Yeop A Sani SCJ).

It is quite apparent that the appellant's interest is entirely monetary in nature. The JVPM agreement bears testimony to this.

The appellant's claim in the civil suit revolves, inter alia, on damages arising purportedly out of the alleged breaches of the terms and conditions of the JVPM agreement. The appellant also seeks, in the civil suit, specific performance of the JVPM agreement.

In seeking for an order of specific performance, the appellant shows its clear intention to proceed with the development of the project land. It can never be denied that the appellant's interest in the event the development of the project land was to be continued pursuant to the JVPM agreement would be centred on the profits to be gained from the development. The appellant seeks monetary compensation in its civil suit. Everything revolves on money.

[23] It was further held in the dissenting judgment that:

In considering whether the private caveat should remain on the register document of title or be removed, the appellant caveator must pass the three stages of inquiry:

(1) whether the appellant caveator has disclosed a caveatable interest in its application under s 323(1) of the NLC;

(2) if the appellant caveator has established a caveatable interest, then whether the evidence produced in support of its claim disclosed a serious question to be tried; and

(3) if both questions are resolved in the appellant caveator's favour, then whether the balance of convenience or justice, lies in favour of the private caveat remaining on the register pending the disposal of the suit.

It is my judgment that the existence of the JVPM agreement and in particular cl 6.1 thereof does not confer on the appellant any caveatable interest and, accordingly, having failed the first stage of the test, it is not necessary for me to consider the other two stages of the test.

FINDINGS OF THIS COURT

[24] Upon considering this appeal, it would appear that the sole issue before us is whether or not the respondent had a caveatable interest as contemplated by s 323(1)(a) of the NLC.

CAVEATABLE INTEREST

[25] A caveat is a creature of statute namely, the NLC and hence it can only be lodged by a claimant who has a caveatable interest under the NLC. The purpose of a caveat is to protect an interest in a land, or a right to an interest in that land (see *Yeong Ah Chee v Lee Chong Hani & Anor and other appeals* [1994] 2 MLJ 614 at p 624) and to preserve the status quo of the land pending the enforcement of such interest or right (see *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 at p 46).

[26] It serves as a substitute for the equitable doctrine of notice under the English land law (see *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 at p 214; *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145; [1969] 1 LNS 116; *Haroon v Nik Mah* [1951] MLJ 209; *Jit Kaur v Pari Singh* [1974] 2 MLJ 199; [1974] 1 LNS 57 and *Butler v Fairclough & Anor* (1917) 23 CLR 78 at p 91).

[27] In a New Zealand case of *Miller v Minister of Mines and Attorney General of New Zealand* [1963] AC 484 at p 497, the Privy Council observed that:

The caveat procedure is an interim procedure designed to freeze the position until an opportunity has been given to a person claiming right under an unregistered instrument to regularise the position by registering the instrument.

[28] Under the NLC, a private caveat is governed by s 323(1) of the NLC. It reads:

Section 323 Applications for entry of private caveats.

(1) The persons and bodies at whose instance a private caveat may be entered are —

(a) *any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;*

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b). (Emphasis added.)

[29] It was submitted by learned counsel for the respondent that the respondent has a registrable interest in the land by virtue of the JVPM agreement, in which the appellant as the land owner had surrendered most of its rights over the land to the respondent. This includes the right to sell the land directly to the end-purchaser, the right to collect the proceeds of the sale, and the right to sign memorandum of transfer in favour of the end-purchaser. In other words, the appellant as the land owner, had effectively surrendered its land in exchange for a pure monetary consideration of 20% from the GDV and it did not retain any single unit or any part of the land. In short, under the JVPM agreement, the appellant as the land owner had practically surrendered all its right over the land to the respondent who had spent a vast sum of money and had transformed the raw land into a developed metropolis. He further argued that, by virtue of the powers of attorney executed under the JVPM agreement, the appellant had relinquished its ownership of the land and it necessarily follows that the respondent had assumed quasi-ownership of the land. The end-purchasers in buying the units would then have registrable interest in the land or a right to such an interest and hence they would have a caveatable interest in the land. Therefore, he submitted that in the circumstances, it would be unthinkable if the respondent does not have a caveatable interest in the land.

[30] In support, he referred us to the case of *Zemine Development Sdn Bhd v Hong Kong Realty Sdn Bhd* [2011] 4 MLJ 466; [2009] 5 CLJ 218. In that case, a joint venture agreement to develop a land was executed between the parties where the respondent held 80% shares of the buildings developed and the appellant held the remaining 20%. The Court of Appeal held that by virtue of the respondent's entitlement to 80% shares of the subdivided lots, that constituted a beneficial interest in the land. He also referred us to the following authorities: *RAP Nathan v Hj Abdul Rahman bin Hj Yusoff & Ors* [1980] 1 MLJ 248 (High Court); and *Medan Damai Sdn Bhd v Chang Nam Lai* [1994] MLJU 305; [1995] 1 CLJ 160 (High Court).

[31] It was further submitted that the respondent's right to lodge a private caveat on the land is contractually guaranteed and agreed to between the parties under cl 6.1 of the JVPM agreement. He referred us to the High Court case of *Kamra Jaya Sdn Bhd v Mulia Cemerlang Sdn Bhd* [2007] MLJU 64; [2007] 3 CLJ 93 in support, wherein Low Hop Bing J (as he then was) said:

> The defendant's caveatable interest in its units on the land was expressly agreed to by the plaintiff as stated in cl 2.2, which was clear and unambiguous and should be given the legal effect it deserves.

[32] In reply, counsel for the appellant submitted that the JVPM agreement including the powers of attorney created thereunder is incapable of creating any caveatable interest in favour of the respondent because the JVPM agreement is only an agreement for sharing the profits from the development of the land. It gives nothing more than a contractual right to manage and develop the land and not the ownership to nor any interest in the land. To support this, she referred us to the following authorities: *Trans-Summit Sdn Bhd v Chun Nyook Lin* [1995] 2 MLJ 247; *Perbadanan Setiausaha Kerajaan Selangor & Ors v Metroway Sdn Bhd & Anor* [2003] 3 MLJ 522 and *Tan Geok Teck dan yang lain-lain v Upaya Kelana (M) Sdn Bhd* [2007] 3 MLJ 497; [2007] 3 CLJ 312, where the Court of Appeal consistently held that a joint venture agreement for sharing of profits per se does not confer any caveatable interest.

[33] In our considered view, *Zemine Development Sdn Bhd v Hong Kong Realty Sdn Bhd* could not support the respondent's case: it is clearly distinguishable on the facts. In that case, the appellant as the land owner entered into a joint venture agreement with the respondent to develop residential and commercial buildings. Under that agreement, a sharing arrangement was agreed to where the appellant will be entitled to 20% of the buildings built while the respondent will retain the remaining 80%. The Court of Appeal affirmed the High Court's decision and held that the respondent has a caveatable interest in the land by virtue of its entitlement to 80% of the subdivided lots of the land. However in our case here, what the respondent had under the JVPM agreement was not any share in the subdivided lots or units of buildings on the land, but merely a share in the profits under the GDV. It is purely a share in the profits and not in the land.

[34] In *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 at p 756; [1995] 3 CLJ 520 at p 547. Gopal Sri Ram JCA (as he then was), discussed at length what is meant by caveatable interest as distinguished from other interest in land. He stated:

> To paraphrase s 323(1)(a) of the Code, a private caveat may be entered at the instance of any person or body who claims either:
>
> (1) the title to land; or

(2) any registrable interest in Land.

The parameters of caveatability under s 323(1)(a) are therefore circumscribed by these words: 'title' and 'registrable interest'. It is only one who makes a claim to either of these in land may enter a private caveat.

Although the words 'title' and 'registrable interest' are not defined by the Code, their meaning may be gathered from the scheme of the Code and from the indefeasibility provision, namely, s 340(1). The latter points to a bifurcation between title (the equivalent of the English fee simple) and registrable interests, that is, leases, charges and easements.

In my judgment, the position that obtains under the Code, so far as is relevant to the present appeal, may be stated in the following way. The Code creates three categories of interests in land. They are as follows.

Category 1: Registrable interests in land.

Only certain interests are capable of registration. Within this are two subcategories, namely:

(a) *Registered title. This may be in perpetuity or for a term of years. It pertains to ownership of land. The 'owner' is termed by the Code as a 'registered proprietor',*

(b) *Registrable interests falling short of ownership. These are leases charges and easements*.

Registration carries with it a bundle of rights, which includes, subject to any restriction imposed by the alienating authority, the right to effect a transfer of the particular registered interest. The Code, in s 340(1), confers indefeasibility upon registered title and interests in land. Section 340(2) creates exceptions which, if established, may operate to defeat such registered title or interest;

Category 2: Interests that are incapable of registration.

These include tenancies exempt from registration, which may be protected by means of an endorsement upon the register document of title;

Category 3: Caveatable interests.

These are unregistered interests which are capable of protection by the entry of a private caveat. *In the context of s 323(1)(a), it is only a claim to the interests falling under category 1(a) and (b) above that may be protected by the entry of a private caveat Cases falling under category (2) are not caveatable interests. A private caveat cannot, therefore, be entered by one who claims such an interest.* Protection for such interests must be secured in the manner prescribed by the Code.

I fear that any other construction upon s 323(1)(a), especially one that places a meaning wider than that I subscribe to, may result in judicial disobedience to the will of Parliament: and that in my view should be avoided at all cost. (Emphasis added.)

[35] It is our considered view, therefore, that based on the provisions of the

NLC and the authorities cited above, the only parties who are authorised to lodge a private caveat are those who may effect dealings in the particular interests in the land. Those parties may either have a claim to the title to the land or a claim to a registrable interest in the land or a claim to any right to such title or registrable interest.

[36] Emphasis should be given to the words 'registrable interest' in s 323(1)(a) of the NLC. To be caveatable, the interest must be an interest in the land and that interest must be capable of registration. In short, it must represent a transaction that can ultimately lead to its registration on the register.

[37] Reverting to this appeal before us, although the appellant has conferred numerous rights on the respondent under the JVPM agreement and the powers of attorney, all these rights are merely rights to develop the land that would give rise only to a monetary interest, ie a right in personam against the appellant and does not create any interest in the land.

[38] Under the NLC, these rights are not capable of registration. They do not fall under any scheme of dealings in alienated lands as provided under Division IV of the NLC.

PRESENT INTEREST AS OPPOSED TO POTENTIAL INTEREST

[39] It is also our considered view that the caveator under s 323(1)(a) of the NLC must have a present interest as opposed to a potential interest in the land. The registrable interest that the caveator is claiming for, must be an existing interest. The caveator under s 323(1)(a) of the NLC must be limited to those who are claiming to an existing interest in the land or right to such existing interest and cannot include potential interest or interest in futuro.

[40] This principle is firmly embedded in our Torrens system. This can be seen in the decision of the Supreme Court in *Tan Heng Poh v Tan Boon Thong & Ors* [1992] 2 MLJ 1. In that case, a caveat lodged by a residuary beneficiary was ordered to be removed because the administration of the estate was still incomplete at the time the caveat was lodged, as such his interest in the land was still unascertainable. Mohamed Azmi SCJ (as he then was) in delivering the judgment of the court at p 8 held as follows:

> In our view, the fact that the caveator was entitled until (sic) the will to a one-sixth share in the eight parcels of land, did not mean that his share was ascertainable before administration was complete. As expressed in the deceased's will, the caveator was in fact entitled to only one share, and para 4 of the will empowered the executor to sell and convert any part of the estate in order to pay the testator's debts apart from the funeral and testamentary expenses. As such, until the administration was complete, the value or extent of the residue on which his one-sixth share depended,

remained uncertain. On established authorities, clearly the caveator in the present appeal had no caveatable claim or interests in any of the property when the caveat was entered. There was no evidence that the administration of the estate was already complete to ascertain the actual worth of the residue for final distribution.

[41] In *Goo Hee Sing v Will Raja & Anor* [1993] 3 MLJ 610 at p 613 Mahadev Shankar J (as he then was) put it as follows:

> The point however is that the claim must be to title or a right thereto in praesenti, and not to some contingent title or right thereto in futuro.

[42] This principle is also applied by other jurisdictions where the Torrens system is in place. Shannon Lindsay in her book *Caveats Against Dealings in Australia and New Zealand*, The Federation Press Australia, 1995 at p 67 states that:

> A caveator must have an interest in the land at the time that it lodges the caveat — it is insufficient that it has some potentially enforceable right against the registered proprietor which has not yet ripened into an interest in particular land.

[43] In a *New Zealand case of Philpott v NZI Bank Ltd* (1990) ANZ Conv Rep 242, the banking terms required that the customer would immediately upon request of the bank provide an additional security, and the question arose as to whether there was a caveatable interest before such additional security was provided. By relying on the Australian case *Re Pile's Caveats* [1981] Qd R 81, it was held that a potential interest is not sufficient to support a caveat. In delivering the judgment for the court, Cooke P, (Casey and Bison JJ agreed with him) held at p 243:

> (the caveator) sought to maintain the caveats by a variety of arguments, all of which come to substantially the same. It was said for instance in s 137(a) the words 'beneficial interest' have a wider scope than equitable interest: that a caveat is supportable if the caveator has some 'potentially' enforceable right; and again that, although (the caveator) had to accept that this was not an equitable charge, nevertheless it was an equitable interest. No authority was cited supporting any of these interpretation of s 137(a). In my opinion, for all purposes material to the present case the words 'beneficial interest' refer to equitable interests and the section cannot be stretched to include mere potentialities which have not ripened into interests in any particular properties.

[44] In the present case, even though the respondent was given the option to purchase the units it developed and transfer the units to itself if it chooses to do so, that right has yet to be exercised at the time when the caveat was lodged. Therefore, the right has not ripened into an interest in the land.

[45] As we have alluded to earlier, a caveat is purely a creature of statute and can only be lodged and maintained according to the statute by a person who is authorised to do so by the statute. Parties cannot by agreement between themselves create a caveatable interest. As was rightly held in *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113, 'the contractual provision does not amount to an equitable or other interest sufficient to support a caveat.' A contract cannot override a statute by inventing a right which is not recognised by statute. The court could not give recognition to such a right (see *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng @ Tan Tien Chi & Anor*).

[46] Any private caveat lodged outside the scope of s 323 of the NLC is bound to be removed. The burden is on the caveator to show that his caveat is within the scope of s 323 of the NLC. The respondent, as the caveator, failed to discharge that burden.

CONCLUSION

[47] Based on the above, we are of the considered view that the respondent has no caveatable interest in the land under s 323 of the NLC, accordingly the caveat is liable to be removed at the instant of the caveatee. Accordingly, we would answer question (ii) in the negative and question (iv) in the positive. And in the circumstances, it is not necessary for us to answer the remaining questions.

[48] The appeal is allowed with costs here and in the Court of Appeal.

Appeal allowed with costs.

Reported by Kohila Nesan